Islamic Family Law and the challenges faced by believers from a Muslim background

There are many challenges our brothers and sisters face – theological, political, economic, psychological and social. There is not a lot of uniformity in these challenges. They vary from country to country and from environment to environment, but BMBs often point out that the sociological challenges they face – especially as these relate to Family Law – are some of the most formidable. This is a growing problem as much of the Muslim World is becoming increasingly Islamicist.

These Family Laws influence relationships within the family, relationships with children and also relationships with the government and its courts. They influence the work environment and the educational institutions. They are involved in issues like finding a spouse, marriage, raising children, the problems of remaining single, divorce etc.

Many of those loyally trying to follow the Lord Jesus say that these are the issues they struggle with more than any others and often there is very little help. Expatriates and believers from a Christian background are very helpful with theological issues. They are sometimes helpful with economic and psychological issues, but very rarely so with family issues.

Careful attention to Biblical principles in relation to these matters will help you give wise advice to our brothers and sisters as they wrestle with these issues that deeply affect their daily lives especially in terms of family relationships.

Islamic Law

There are a number of areas of Islamic law that we will not deal with:

- Islamic constitutional law
- The Criminal Code
- Contract and Tort, Commercial Law etc.

We will focus on what the Sharia and some of its reforms say about Family Law.

Islamic Family Law has really entered into the cut and thrust of Muslim life more than any other aspect of Sharia. In the Qur'an the only parts of law that you find are broadly speaking things about marriage and divorce, inheritance and a few about certain criminal offences. Family Law in the Muslim World today is largely about personal status. It has been modified over time as we will see. But in most Muslim countries it relates to marriage and divorce, paternity, guardianship, testate and intestate succession and laws relating to gifts – **waqf** (religious and family endowments) as this is usually a family affair.

Some historical background

There are two terms used to refer to Law – **Sharia** and **Fiqh**. Sharia refers to God's Divine Law as contained in the Qur'an and in the sayings and doings of Muhammad (Hadith). Fiqh refers to the scholarly efforts by jurists to elaborate the details of Sharia through investigation and debate. Muslims understand Sharia to be an unchanging revelation, while fiqh is a human endeavour and is open to debate and change.

There are two sorts of fiqh literature. One deals with "roots" – an exploration of the Qur'an, Hadith, ijma (consensus) and qiyas (analogical reasoning) – the other sort of fiqh literature deals with "branches" – legal manuals, codes of Law and collections of cases. It discusses rules for both rituals and social relationships (Family Law). In fiqh literature there are five categories of action: mandatory, recommended, permitted, abhorred and prohibited.

In the 19th and 20th centuries there has been an impetus to reform Islamic Law, but there is also a counter-reform movement.

In the Ottoman Empire there were various reforms beginning with the Tanzimat reform (1839) and the Mecelle reform (1869) and finally the Magella Code in 1879. This last code was based on principles derived from the Hanafi School of Law – modified and codified.

The law was promulgated by the Ottoman Caliph. In the Arab World it is often called the Ottoman Code. In Turkey this didn't survive Ataturk's declaration of a secular republic in 1923. It was largely replaced by a Swiss-based civil code. But the Ottoman Code was still widely applied until the 1950s in Syria, Palestine, Iraq and Lebanon.

In Egypt reform in the 20th century sought to integrate Sharia with 'Western Law' and in particular with French Law (the Napoleonic Code). This was devised by Ald-al-Rizzaq-al-Sanhuri. This code of Family Law was widely adopted by other Muslim countries.

In India during the British Raj there was a sort of 'piecemeal legislation' for Muslims called the Anglo-Muhammadan Law.

Reforms in South-east Asia were heavily influenced by local customary law (adat). There are now Codes of Family Law in most Muslim countries – but with wide variations.

The Problem

How do you reform a law that is based on divine revelation?

To do so openly suggests that you know better than God! Therefore to abandon all aspects of Sharia is almost impossible for Muslims. [This is why British Muslims are pressuring the UK government to allow Islamic Family Law to be used within the Muslim community.] So either they apply the full Sharia or they have to get around the problem. The consensus in most Muslim countries in the area of Family Law is that they have fulfilled in their codes all the requirements of Sharia.

In Constitutional, Criminal and Commercial Law it is much more difficult to apply Sharia in this age of globalisation. It was applied in "the golden days" of the early Caliphs and it will be applied in the golden days of the future when the Mehdi comes. In the meantime Muslims have to live in a wicked world dominated by infidels. (International Law, Human Rights, etc.) But these reforms don't usually extend to Family Law – i.e. the rights of women in the Ottoman Code were truly appalling. However in most Muslim countries there has been some reform in Family Law using four principles:

1. **Procedural Devices**

To give an example: What happens if a man dies and another man states that before his death, the first man made a verbal request to give the second man $1000. Testimony by word of mouth is legal in Sharia. The claimant has to produce two responsible male adults who state in court that what the second man said was true. In this case he will get his $1000 in spite of the fact that the first man's family may dispute the statement saying nothing like that happened.

Reforms in many Muslim countries say that certain claims that might be valid under Islamic Law would not be enforced by the courts in the absence of documentary evidence. This is a procedural device.

This is how the government of Egypt limited child marriage. Muhammad married Aisha when she was about nine so child marriage must be lawful under Sharia. So how do you change it? In Egyptian law a wife and her family could not enforce any of the rights of marriage unless the marriage contract had been performed before a suitable official appointed by the government. This official was forbidden to marry a boy who was under 18 and the girl under 16.

In the early days it was relatively easy to cheat as few had birth certificates, but not so now. So marriage wasn't legal unless it was properly registered by an official. This is a procedural device.

2. **Eclectic devices** – i.e. accepting options from various sources

As you know, there are four recognised orthodox schools of Islamic Law (and some others that are non-orthodox) and in each School of Law there are various opinions.

So in the 20th century, Codes of Family Law were developed by borrowing an opinion from a jurist in this School of Law and adding it to what a different jurist said from another school. These various opinions were put together, often in non-consistent way but a way that made sense in the prevailing situation. Usually the sources weren't acknowledged but the Code had a respectable authenticity about it. It was the way it was put together that was new.

Sometimes neither a procedural device nor an eclectic device could help so a new form of 'ijtihad' (interpretation) was developed.

3. **Neo-ijtihad** (re-interpretation)

What emerges is a new law but one derived from original sources. In Tunisia, for example, this was the way polygamy was made illegal. This was not based on the original texts of the Qur'an, But President Bourgiba brought this new rule into The Family Code on the basis of two considerations:

- Certain human institutions – such as slavery and polygamy – made sense at a certain stage in human history, but don't make sense today and are offensive to the conscience of today. In nearly every Muslim country, including Saudi Arabia, slavery has been abolished legally on this basis. Slavery is perfectly legal in Islamic Law, but is now illegal in most Muslim countries.
- The Sura in the Qur'an where it says a man may marry up to four wives at one time, adds a condition: he must treat them all with equal justice. *"This is better for you – but you must not act in a wrong way."*

  One interpretation by the Shafi School of Law (which is the prominent School of Law in the Middle East, Pakistan, Indonesia etc.) says that this condition, *"So that your children may not increase".* So the interpretation in many Muslim Countries is that a man may only marry a second wife if he is able to support all his existing dependants. And if he takes on more wives and children, all these dependants must be treated equally.

President Bourguiba said that history has proved that no man who is less than a prophet is capable of such a feat! So it is within the competency of the State to forbid Muslims to do something that is legal in the Qur'an but that they cannot do without sinning – i.e. without breaking the Qur'anic condition. So polygamy is forbidden in Tunisia.

4. **Administrative devices**

This is the fourth way and it is more or less based on three previous devices. The argument is that these laws are not contrary to Islamic Law.

So there is a lot of new legislation that has been introduced into Family Law in Muslim countries. It varies a lot from country to country. Increasingly pressure is being put on governments by Islamicists to eliminate Western Codes of Law – especially in Family Law – and to reintroduce some of the original forms of Sharia.

A Brief Overview of Family Law

There are other areas than these, but this will give you a flavour.

Marriage and Family

A marriage contract requires an offer by the bridegroom's family and acceptance by the bride's family before witnesses. The bride needs a guardian (wali) to act on her behalf (usually her father). There are differences in the nature extent and duration of the wali's authority.

Shi'a jurisprudence allows a temporary marriage (mutah) in which the parties stipulate a predetermined end date of the marriage – usually three days.

There is a principle of **Equivalence** (kafaah) that refers to a tradition requiring husband and wife to be of equal rank in lineage, social status and wealth. Different Schools of Law stress different areas of equivalence. [The Hanafi School says the husband's occupation is critical; the Maliki School stresses piety, while the Hanbali School stresses lineage.] This is a major reason why bride and groom usually come from the same extended family.

The groom is required to give his wife a dowry (makr) which is her property alone to dispose of as she wishes. The groom may pay a portion of the dowry at the time of the contract and the rest at a time specified in the marriage contract.

During marriage the wife is entitled to maintenance and support, which includes food, clothing and accommodation. With divorce this entitlement terminates.

A man may marry up to four wives, but women may marry only one man at a time. Family Law permits men to marry non-Muslim monotheistic women. It is illegal for Muslim women to marry non-Muslim men.

In many Muslim countries divorce by a husband is effected by a unilateral pronouncement known as 'talaq'. This severs the legal relationship. Note that this is a violation of Qur'anic teaching and so is subject to many modern reforms. After 'talaq' the couple must refrain from sexual intercourse for three months. At this time the marriage is terminated and the wife returns to her family home. There are many legal impediments that women face in divorce, including difficulties of child custody.

Legal adoption is not permissible under traditional Sharia Law (see Qur'an 33:45). Children must carry their own name as well as that of their father and grandfather since children need to know their origins. If children are adopted, they cannot legally inherit under Islamic Law. Informal adoption is known and is often called 'embracing the child'. Such children receive monetary gifts during their 'parents' lifetime.

There are two Family Laws that also relate to divorce:

- Khul (Removal): This refers to a divorce procedure in Sharia whereby a woman may obtain a divorce without showing cause by giving back her dowry to her husband together with other financial benefits she has accrued. This divorce procedure is initiated by the wife and is not revocable during the waiting period (iddah) prescribed for women. Different Schools of Law disagree as to whether the consent of the husband is necessary.
- Lian (Mutual Repudiation): This is a Qur'anic institution governing cases in which a husband accuses his wife of adultery, but is unable to supply any witnesses (see Qur'an 24:6-9). The husband has to swear four times before a qadi that his accusation is true, followed by a fifth oath in which he invokes the wrath of God upon himself if he is lying.

  The wife may neutralise this claim by responding with four oaths of her own and a fifth that calls upon her the wrath of God if her husband is telling the truth. If she takes the oath, she is declared innocent and permanently divorced from her husband. Her husband, in turn, forfeits any paternity claims over children born subsequent to their sworn oaths. If she refuses to take the oath, she is presumed guilty and is subject to the punishment for adultery.
- Inheritance (Mirath): This covers laws that relate to bequests, property and waqf (gifts). This is very detailed. The Qur'an contains more extensive and specific rules on inheritance than on any other subject. Sunni and Shi'a Law diverge on the interpretation of these Laws. The Shi'a keep more inheritance within the nuclear family and place the daughters of the deceased in a more favourable position than under Sunni Law.

There are other Family Laws relating to:

- ✓ Funeral rites
- ✓ Age of majority
- ✓ Duties related to keeping the peace
- ✓ Duties of good manners, respect for the elderly, kindness to children etc
- ✓ Dress codes for men and women
- ✓ The status of women

An Islamic view of Family Law is really all encompassing. So a believer from a Muslim background has considerable difficulty working through Kingdom principles and dealing with the practical issues that constantly arise.